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No. 966

In the Supreme Court of the United States

OCTOBER TERM, 1963

LOUIS O. FAUBUS, S. ADLER, GUNTHER ANDERS, ET AL., PETITIONERS

v.

ROBERT S. MCNAMARA, SECRETARY OF DEFENSE OF THE UNITED STATES, GLENN T. SEABORG, CHAIRMAN, JOHN S. GRAHAM, ET AL., MEMBERS OF THE ATOMIC ENERGY COMMISSION OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
Department of Justice, Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 965

LINUS C. PAULING, S. ADLER, GUNTHER ANDERS, ET AL., PETITIONERS

v.

ROBERT S. MCNAMARA, SECRETARY OF DEFENSE OF THE UNITED STATES, GLENN T. SEABORG, CHAIRMAN, JOHN S. GRAHAM, ET AL., MEMBERS OF THE ATOMIC ENERGY COMMISSION OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

This case originated with a suit filed in 1962 by petitioners, 255 residents of the United States and several foreign countries, to restrain the respondents from testing nuclear weapons on the theory that the Atomic Energy Act, 42 U.S.C. 2011, did not authorize such testing, or, if it did, was unconstitutional (J.A. 1–46).[1] Eleven of the petitioners had previously

[1] "J.A." references are to the printed Joint Appendix in the Court of Appeals, which is included as part of the record in this Court.

730-026—64

brought an unsuccessful action against the then Secretary of Defense and members of the Atomic Energy Commission to enjoin the testing of nuclear weapons. *Pauling* v. *McElroy*, 164 F. Supp. 390 (D.D.C.), affirmed, 278 F. 2d 252 (C.A.D.C.), certiorari denied, 364 U.S. 835.

The present action was dismissed by the district court on the grounds, *inter alia*, that the petitioners lacked standing to sue and that the testing of nuclear weapons was "authorized by law and * * * not prohibited by the Constitution." (J.A. 49). The Court of Appeals affirmed, holding that the district court "was plainly correct on all points." (Pet. App. 2a.) Chief Judge Bazelon, in a separate opinion, expressed the view that the case was moot in light of the recent Nuclear Test Ban Treaty (Pet. App. 5a–6a).

The decision below is clearly correct. To begin with, petitioners lack standing, for they have failed to allege any injury to themselves apart from an asserted injury to mankind generally. As this Court emphasized in *Massachusetts* v. *Mellon*, 262 U.S. 447, 488, a party must show some direct injury to himself over and above the fact "that he suffers in some indefinite way in common with people generally." See, also, *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 132, holding that complainants challenging governmental action are without standing where they "show no more than a mere possible injury to the public." The instant case falls squarely within these precepts. The gravamen of the complaint is that the detonation of nuclear weapons creates "radiation

that damages the population of the world, among them the plaintiffs * * *". (J.A. 33).

Even if petitioners had standing to maintain this action, there can be no doubt that the testing of nuclear weapons is authorized by law. In the Atomic Energy Act of 1954, Congress declared it to be the policy of the United States that "the development, use, and control of atomic energy" shall be "subject at all times to the paramount objective of making the maximum contribution to the common defense and security * * *." 42 U.S.C. 2011. And Congress had found that "[t]he development, utilization, and control of atomic energy for military and for all other purposes are vital to the common defense and security." 42 U.S.C. 2012. In furtherance of this declared policy and its express finding, Congress explicitly authorized the Atomic Energy Commission to (42 U.S.C. 2121):

> (1) conduct experiments and do research and development work in the military application of atomic energy; and
>
> (2) engage in the production of atomic weapons, or atomic weapon parts, except that such activities shall be carried on only to the extent that the express consent and direction of the President of the United States has been obtained, which consent and direction shall be obtained at least once each year.
>
> (b) The President from time to time may direct the Commission (1) to deliver such quantities of special nuclear material or atomic weapons to the Department of Defense for such use as he deems necessary in the interest of

national defense; or (2) to authorize the Department of Defense to manufacture, produce, or acquire any atomic weapon or utilization facility for military purposes: *Provided, however*, That such authorization shall not extend to the production of special nuclear material other than that incidental to the operation of such utilization facilities.

The policies of the Act are also to be effectuated by "a program of conducting, assisting, and fostering research and development," which includes the extension of scientific or technical findings and theories into "practical application for experimental and demonstration purposes, including the experimental production *and testing of models, devices, equipment, materials, and processes.*" (Emphasis supplied.) 42 U.S.C. 2013(a), 2014(y).

The constitutional claim is patently insubstantial. Certainly, in the exercise of its specific power to "provide for the common Defence * * * of the United States," U.S. Const., Art. I, Section 8, the authority of Congress to authorize the testing of nuclear weapons is beyond doubt. *Cf., Hirabayashi v. United States*, 320 U.S. 81, 93; *Silesian-American Corp. v. Clark*, 332 U.S. 469, 476–477.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

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